(2)

No. 90-245

In The

Supreme Court of the United States

October Term, 1990

REX A. SHARP, KEITH WILSON, JAMES H. MORAIN, DANIEL H. DIEPENBROCK, and TAMMIE E. KURTH, as individuals, NEUBAUER, SHARP, McQUEEN, DREILING & MORAIN, P.A., as a firm, and ALL OTHER LAWYERS AS A CLASS REQUIRED BY THE STATE OF KANSAS TO REPRESENT KANSAS INDIGENT CRIMINAL DEFENDANTS,

Petitioners,

v.

THE STATE OF KANSAS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROBERT T. STEPHAN
Attorney General of Kansas

JOHN W. CAMPBELL
Deputy Attorney General
Kansas Judicial Center
Second Floor
Topeka, Kansas 66612-1597
(913) 296-2215
Counsel of Record
for Respondent

QUESTION PRESENTED FOR REVIEW

I. SHOULD THE COURT ABOLISH THE STATES' ELEVENTH AMENDMENT IMMUNITY?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS WHY THE PETITION SHOULD BE DENIED	4
I. THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISION OF THE ANY OTHER UNITED STATES COURT OF APPEALS OR THE UNITED STATES SUPREME COURT	4
II. PETITIONERS' CLAIMS HAVE BEEN LITIGATED THROUGH STATE COURT SYSTEM AND ARE ALREADY UNDER REVIEW BY THIS COURT...	5
CONCLUSION	7

TABLE OF AUTHORITIES

Page

United States Supreme Court Cases

Atascadero State Hospital v. Scanlon,
473 U.S. 234, 87 L.Ed.2d 171, 105 S.Ct. 3142 (1985) 4

Migra v. Warren City School Dist. Bd. of Ed.,
465 U.S. 75, 79 L.Ed.2d 56, 104 S.Ct. 892 (1984) 6

Welch v. Dept. of Highways & Public Transportation,
483 U.S. 468, 97 L.Ed.2d 389, 107 S.Ct. 2941 (1987) 4

United States Court of Appeal Cases

Sharp, et al. v. State,
No. 88-1553 (10th Cir. May 7, 1990) 2

United States District Court Cases

Barger v. State of Kansas,
620 F.Supp. 1432 (1985) 4

Sharp, et al. v. State, et al.,
No. 88-1001-K (D.Kan. March 16, 1988) 2

State Court Cases

In re Estate of Reed,
236 Kan. 514, 693 P.2d 1156 (1985) 6

Hutchinson Nat'l Bank & Trust Co. v. English,
209 Kan. 127, 495 P.2d 1011 (1972) 6

Sharp, et al. v. State,
245 Kan. 749, 783 P.2d 343 (1989) 3, 5

Sharp, et al. v. State,
Seward County Case No. 90-C-14 .....3, 6

State ex rel Stephan v. Smith,
242 Kan. 336, 747 P.2d 816 (1987) 2

TABLE OF AUTHORITIES—Continued Page

United States Constitution

U.S. Const. Amend. XI 2

Federal Statutes

28 U.S.C. 1738 6

State Statutes and Regulations

K.S.A. 22-4501 et seq. 1

No. 90-245

In The

Supreme Court of the United States

October Term, 1990

REX A. SHARP, KEITH WILSON, JAMES H. MORAIN, DANIEL H. DIEPENBROCK, and TAMMIE E. KURTH, as individuals, NEUBAUER, SHARP, McQUEEN, DREILING & MORAIN, P.A., as a firm, and ALL OTHER LAWYERS AS A CLASS REQUIRED BY THE STATE OF KANSAS TO REPRESENT KANSAS INDIGENT CRIMINAL DEFENDANTS,

Petitioners,

v.

THE STATE OF KANSAS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE

This appeal is from the first of petitioners' three suits against the State of Kansas. The petition for a writ of certiorari is the second file in these cases. The other petition under consideration is found in *Sharp, et al. v. State,* Case No. 89-1978.

Through these actions, petitioners have sought monetary damages allegedly sustained as result of the Indigent Defense Services Act, K.S.A. 22-4501 et seq. (Weeks) as amended, its statutory precedent, and the rules and reg-

ulations promulgated pursuant to the Act. Petitioners are attorneys at law, as well as a professional association of attorneys who were appointed by state district courts to represent indigent criminal defendants. They were compensated pursuant to the Act.

The origins of this case are found in the December 15, 1987 opinion of the Kansas Supreme Court in the case of *State ex rel Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987). In that case, Chief Justice Miller, writing for a unanimous Kansas court, reversed century old precedent and found that attorneys appointed to defend indigent criminal defendants do have a right to compensation. It was truly a landmark decision for the state. It recognized attorney services as property protected by the Constitution for the first time in Kansas. Petitioners had absolutely nothing to do with this change in the law.

The Kansas Legislature meets from January to April each year. The state's fiscal year begins on July 1, and ends on June 30 of each year. The *Smith* decision did allow the state legislature the time needed to double the indigent defense system's budget, create a voluntary system of court appointments, and expand the public defender system.

On January 4, 1988, three weeks after the *Smith* decision, petitioners' filed a Class Action Complaint and Mandamus Proceeding against the State of Kansas in the United States District Court for the District of Kansas. This action was subsequently dismissed without prejudice on the basis of 11th Amendment Immunity. The dismissal was upheld by the Tenth Circuit Court of Appeals. (*Sharp, et al. v. State, et al.*, No. 88-1001-K (D.Kan. March 16, 1988), affirmed, *Sharp, et al. v. State*, No. 88-1553 (10th Cir., May 7, 1990.) (Sharp I)

On March 16, 1988, petitioners filed a Class Action Petition against the State of Kansas in the State District Court of Seward County, Kansas. Summary judgment was entered in favor of Kansas. The primary basis of the state's argument was that the petitioners were suing the wrong defendant under numerous theories of law which either did not exist, or did not apply to the State of Kansas. (*Sharp, et al. v. State*, Seward County Case No. 88-C-33.)

On December 8, 1989, the Kansas Supreme Court affirmed the district court's judgment. Chief Justice Miller, again writing for a unanimous court, found that petitioners had not stated a cause of action in the district court. Further, the court would not allow petitioners to raise their express inverse condemnation theory for the first time at the appellate level. (*Sharp v. State*, 245 Kan. 749, 783 P.2d 343 (1989), *rehearing denied* March 14, 1990.) (Sharp II)

On January 18, 1990, petitioners again filed a Class Action Petition against the State of Kansas, in the District Court of Seward County, Kansas. Petitioners, in this action, seek monetary damages under a Fifth Amendment inverse condemnation theory, as well as a state claim of unjust enrichment. (*Sharp, et al. v. State*, Seward County Case No. 90-C-14.) (Sharp III)

On June 12, 1990 petitioners filed a petition for a writ of certiorari to the Kansas Supreme Court in the case of *Sharp, et al. v. State*, 245 Kan. 749, 783 P.2d 343 (1989) rehearing denied (1990), petition for cert. filed in Case No. 89-1978. (Sharp II)

On August 6, 1990 petitioners filed another petition for a writ of certiorari in this case. (Sharp I) Respondent received its copies of the petition on August 8, 1990.

REASONS WHY THE PETITION SHOULD BE DENIED

1. THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER UNITED STATES COURT OF APPEALS OR THE UNITED STATES SUPREME COURT.

The State of Kansas was properly dismissed by the district court. The Eleventh Amendment of the United States Constitution bars federal court jurisdiction over Kansas in this case. There is neither an Act of Congress nor a decision of this Court which would indicate that either the district court or the appellate court erred.

The law of Eleventh Amendment immunity is stated in *Welch v. Dept. of Highways & Public Transportation*, 483 U.S. 468, 472-474, 97 L.Ed.2d 389, 107 S.Ct. 2941 (1987). The arguments against the Eleventh Amendment have been made and rejected. *Welch* at 478-496.

Kansas has never waived its Eleventh Amendment Immunity. *Barger v. State of Kansas*, 620 F.Supp. 1432 (1985). In none of the federal statutes relied upon by plaintiff has Congress, ". . . expressed its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243, 87 L.Ed.2d 171, 105 S.Ct. 3142 (1985). Petitioners cannot fashion a constitutional remedy which would override the Eleventh Amendment. *Paul v. Davis*, 424 U.S. 693, 701, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976).

Petitioners could have remained in the federal courts. In their amended petition they named two state officials as defendants. However, petitioners choose not to seek a

remedy in federal court as is currently provided by law. They choose instead to voluntarily dismiss the individual defendants in federal court, pursue a full remedy against Kansas in the state courts and appeal the Eleventh Amendment issue to the Tenth Circuit.

The Tenth Circuit has followed the law. For a century the Eleventh Amendment has stood a part of the delicate balance of power between the states and the federal government. This is not the case in which that balance should be destroyed.

II. THE UNDERLYING ISSUES OF THE PETITIONERS' CLAIM HAVE BEEN LITIGATED THROUGH THE STATE COURT SYSTEM AND ARE ALREADY UNDER REVIEW BY THIS COURT.

In the case of *Sharp, et al. v. State*, 245 Kan. 749, 783 P.2d 343 (1989), *rehearing denied* March 14, 1990, (Sharp II) petitioners were denied monetary relief which were based on the same claims that they had asserted in federal district court. The decision of the Kansas Supreme Court has been appealed to this Court in Case No. 89-1978.

If the Court were to reverse the Kansas Supreme Court in Case No. 89-1978, the state courts would follow the law established by this Court. Petitioners veiled allegations of wrong doing by the Kansas Supreme Court are not supported in fact or law. Petitioners have failed to cite any federal precedent by which petitioners would have prevailed in their litigation against the state in federal court.

Such a precedent, if established by this Court, would be followed. State court action in response to such new precedent would be reviewable by this Court.

However, if the Court refuses to reverse the Kansas Supreme Court in Case No. 89-1978, petitioners' Eleventh Amendment claim is moot. The decision of the Kansas Supreme Court in Sharp II would, by operation of the doctrine of res judicata, prevent petitioners from relitigating their claims in federal court.

The Kansas Supreme Court's decision bars petitioners from relitigating this case in state court. *In re Estate of Reed*, 236 Kan. 514, 519, 693 P.2d 1156 (1985). This bar would apply equally to the federal district court. 28 U.S.C. 1738; *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 80-81, 79 Ed.2d 56, 104 S.Ct. 892 (1984).

It should be noted that petitioners have filed a third suit in state court. *Sharp, et al. v. State*, Seward County Case No. 90C-14, Sharp III. In this action petitioners seek to litigate a federal law claim first raised on appeal in Sharp II and a state law claim. The State has filed a motion to dismiss based on res judicata and failure to state a claim upon which relief can be granted.

Kansas is confident that the state courts will not allow the relitigation of claims based on legal theories which could have been property raised in Sharp II in the state district court. In Kansas, res judicata is based on the opportunity to litigation, not the actual litigating. *Hutchinson Nat'l Bank & Trust Co. v. English*, 209 Kan. 127, 130, 495 P.2d 1011 (1972).

Petitioners have had their day in court and lost. Neither Kansas nor federal law provides a second chance.

CONCLUSION

The Respondent, State of Kansas, respectfully submits that the Writ of Certiorari prayed for in this action be denied for the following reasons: (1) The decision of the Tenth Circuit Court of Appeals does not conflict with the decisions of any other United States Court of Appeals or the United States Supreme Court; and (2) Petitioners' claims have been litigated in the state court system and are already under review by this court.

Respectfully submitted,

ROBERT T. STEPHAN
Attorney General of Kansas

JOHN W. CAMPBELL
Deputy Attorney General
Kansas Judicial Center
Second Floor
Topeka, Kansas 66612-1597
(913) 296-2215
Counsel of Record for Respondent